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Supreme Court, U.S.
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No. 09-___

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
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May 18, 2009

QUESTIONS PRESENTED

1. Infringement of Due Process of Law by CCP § 391 The First Amendment allows prior restraint on disclosure of some military secrets and may subject one who often "yells 'fire' in a crowded theater" to prior restraint. Likewise, there is some constitutional space for vexatious litigant restrictions that limit the right to petition for redress of grievances via the courts. Can the concept of "multiple frivolous litigations" be stretched to the point where unsuccessful discretionary appeals from attorney's fees awards (for resisting previous attorney's fees awards) by self-represented Defendants in a single action, can each be termed as "separate litigations" and each stage of the appeal process be classified as a "final determination" (even though no opinion is issued except for a statement that review is denied), for purposes of a finding that such defendants are "vexatious litigants." Is *Marbury v Madison* still good law? ("The very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws, whenever he receives an injury.")

2. Infringement of Equal Protection by CCP § 391 Can defendants labeled as vexatious litigants be subjected to prior restraint of their right to appeal a State Superior Court's vexatious litigant finding to higher courts, and can that court circumscribe other appeals from its actions? Can any and all unauthorized appeals properly be punished by fines and imprisonment for contempt of court? Can such an open-ended prior restraint on court filings (for whatever purpose and however labeled), properly take precedence over U.S. Supreme Court Rule 29.3, so

that a copy of a Petition for Certiorari by defendants thus labeled, is rejected from the main case file of the court where this action has been brought. Can a Superior Court ignore the existence of an appeal it has excluded from the case file and immediately enforce a judgment under appeal contrary to explicit stay requirements of state law? Will the United States Supreme Court stay such an enforcement while it considers an appeal of related alleged violations of federal law, when it was impossible for a "vexatious litigant" to first submit such a stay request to the court affected, because any such a stay request has been classified as prohibited "new litigation"?

3. Does CCP § 1161.2(c) violate Due Process of Law? Is secrecy in the adjudication of Unlawful Detainer actions, (for the first 60 days statewide and much longer in Sonoma County), a deprivation of Due Process of Law, when its purpose is to limit awareness of their legal rights by tenants facing eviction? Is an eviction in a civil action, sufficiently life altering in its consequences, that the public trial mandate of the Sixth Amendment applies? Does Justice Brandeis' maxim that "Sunlight is the best disinfectant" embody evolving standards of fair play (in a parallel fashion to Eighth Amendment jurisprudence) so as to have become a normal ingredient of Due Process of Law?

4. Does CCP § 1161.2(c) violate Equal Protection? If a state constitution requires jury trials in civil matters to the same or greater degree than the Seventh Amendment, must this right be made available to all classes of civil litigants without

irrational distinctions? Are special secrecy provisions for Unlawful Detainer actions (explicitly designed to preclude self-represented tenants from learning of procedural options available to tenants able to afford an attorney) a violation of Equal Protection of the Laws, when the effect of the secrecy is to make it inevitably self-defeating for tenants to exercise their right to a jury trial?

5. Is Off-The-Record Judicial Action Unreviewable? Can a judicial action, taken off the record (in the sense that there is nothing in the case file, electronic docket or court-room minutes to cause a reasonable person to understand that this action has taken place) become immune to federal Due Process review? (Here the only reviewing court which provides an opinion says: "appellants fail to demonstrate any reversible error with respect to [a bench ruling saying no more than the amount of the award] or any order appealed from by way of appellants' notices of appeal.")

6. Trial Court Circumvents Timely Notice of Appeal Where a trial court signs a September 25, 2007 order and inserts it in the case file without serving it on the parties, and where the party granted $10,000 in attorney fees by that order does not serve it, but uses it to secure a writ of execution on October 2, 2007 (without notifying the opposing party) and the trial court falsely asserts in an (11/7/07) docket entry that the (9/25/07) order has been served, is the trial court required to respect the 90 day period allowed for appealing unserved orders, and recognize the validity of a November 21, 2007 Notice of Appeal from the $10,000 fees award?

7. Simply ignoring pivotal factual and legal issues Here the Appellate Branch recognized the validity of Defendants' November 21, 2007 Notice of Appeal and (on 1/14/08) scheduled a hearing on it. Later, the Appellate Branch refused to address the validity of actions taken to enforce the $10,000 fees judgment in disregard of this Notice of Appeal. This enforcement violated CCP § 916(a) stay provisions. Is this a proper exception to the general policy of Rule 10, which may shield erroneous factual findings and misapplications of recognized rules of law from review?

8. Right to rebut "stealth" grounds for opposition California's CCP § 703.560 requires a judgment creditor who opposes a Claim of Exemption to provide (ten days before the hearing) facts supporting his opposition. Here the judgment creditor violated the ten day notice period and said no more than that the cited decisional and statutory basis for the Claim of Exemption "does not apply to James Parker." Here the judge refused to allow supplemental written proof that CCP § 916(a) and 917.1(d) do indeed apply (as noted in *Ziello v Superior Court*, *Nielsen v Stumbos* and *Vadas v Sosnoski*), despite authorization for such supplemental proof by CCP § 703.580 (a) & (c). Is it a violation of Due Process of Law for the trial court to have deprived judgment debtor of an opportunity to respond, because "when a Court considers a claim of exemption, the only documents that are under consideration with regard to the motion are the claim of exemption itself and the notice of opposition"?

9. Can Trial Courts Issue *Fait Accompli* Judgments? If a Claim of Exemption is denied on November 20th on the ground there has been no valid appeal, an appeal is perfected on November 21st, and a Claim of Exemption citing this appeal is filed on November 21st, can this appeal be ignored (along with California's CCP § 916(a) and § 917.1(d)) so as to enforce a judgment for attorney's fees and other costs, on November 26th, without waiting for the appeal to be decided?

10. Is Review of Sub Rosa Judicial Action Untimely? Where Defendants have reason to believe their November 21, 2007 Notice of Appeal has been respected (when, in fact, it was by-passed by off-the-record instructions to the Sheriff on November 26, 2007), does refusal of the Sheriff's office to provide any proof of what has transpired (insisting over a period of many months that Defendants should "check the file" for the proof they needed), provide a basis for federal review of this matter (in spite of state remedies not having been exhausted, because the Appellate Branch has refused to address the off-the-record turnover, since Defendants thought their money would be retained in the Sheriff's holding account, and did not raise the issue of a possible turnover, in their November 21, 2007 Notice of Appeal?

11. Does Federalism Protect Insider Favoritism? Where a judge has been censured for dishonesty and admitted favoritism by the State Commission on Judicial Performance, and California (in CCP § 1281.9) allows a litigant one peremptory challenge of a trial judge, and there is a governing

precedent (*Haworth v Superior Court*) which invalidates everything a judge does in a case (who fails to disclose a prior censure, so that the right of peremptory challenge may be exercise in an informed manner), is this aspect of state law federally enforceable, in spite of a "hands off" attitude of state appellate judges? If this is not true as a general matter, will the Supreme Court make an exception where the judge in question has been censured for seeking favored treatment for herself, on the ground that her husband is a Justice of the State Court of Appeal?

12. Hidden Favoritism toward a Judge's Supporters Here the Commission on Judicial Performance notes that one reason it did not seek to remove Judge Elaine Rushing from office, was the fact that several members of the local legal community came forward in her defense. Judge Rushing has not made the list of her supporters public, and the attorney she has awarded $50,000 in attorney's fees to has refused to say whether he is among those who urged that Judge Rushing be retained in office. Is canon 1 of California's Code of Judicial Ethics (which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) federally enforceable, in the sense that the appearance of partiality toward the recipient of $50,000 in UNEXPLAINED attorney fees is a violation of Due Process of Law?

13. Change of Venue When Favoritism Runs Rampant NONE of the rulings of the trial court EVER MENTION well documented charges of misconduct by Plaintiff's counsel, and none of the

rulings of the Appellate Branch EVER MENTION well documented charges of judicial misconduct. California's appeal process in limited jurisdiction cases (where cases involving more than $25,000 are not supposed to be considered) is described in the June Primary 1998 Voter's Pamphlet argument against Proposition 220: "Under this proposal superior court judges will be assigned to sit on an appellate court to review the decisions of other superior court judges in cases that used to go to the municipal court. A judge cannot fairly review the work of a colleague, knowing that perhaps next week their roles will be reversed. The appearance and substance of justice will be questioned and public confidence in the courts will be eroded." Does the totality of an appearance of an "I'll watch your back, you watch mine" mentality on the Sonoma County Superior Court, rise to the level of entitling Defendants to an entire fresh start with a change of venue to some other county?

14. Subterfuge Hardly Falls within the Domain of Law May a Sheriff accept as a basis for enforcement action, a judicial ruling that arguably fits the circumstances of a case at the time a ruling was made, but is untenable in view of a Notice of Appeal and Claim of Exemption which precedes by five days implementation of the original ruling? Does this violate *Yick Wo v Hopkins*, which bars discretion "which is purely arbitrary and acknowledges neither guidance nor restraint"? Where there is no legal basis for enforcing a judgment while it is under appeal, does a judge who operates off-the-record to accomplish this, act "without any semblance of jurisdiction" within the meaning of judicial immunity

from personal accountability for a judge's official acts?

15. OEX Effort to Facilitate Premature Enforcement When state law says that a judgment under appeal is not enforceable when it consists of only attorney's fees and other costs, may Order of Examination proceedings be calendared before the initial appeal is filed and go forward a month after an appeal has been perfected? Where a trial court is willing to operate off the record and a sheriff is willing to seize bank accounts whenever told to do so by this judge, does forced disclosure of financial information effectively amount to an unconstitutional confiscation of property in violation of the Due Process Clause of the Fourteenth Amendment?

16. Relief from OEX Interference with Our Appeals If after three OEX hearings (and research by defendants) the judge realizes that such proceedings were premature, can defendants who were thus diverted from working on their appeals be properly given a "second bite at the apple" with respect to seeking discretionary review (with respect to other legal issues not directly involved in the OEX proceedings)?

17. Is Discretionary Review Protected by Stay Rules? If OEX hearings are reset (after briefing for the first level of appellate review, but the hearing has not yet been held), does a subsequent ruling in Plaintiff's favor by the local Superior Court Appellate Branch justify forcing the disclosure of financial information, even though Defendants are seeking discretionary review of the Appellate Branch

ruling?

18. Two-Way Responsibility to Observe Court Rules Can an attorney threaten unrepresented Defendants with "the utmost of every possible sanction" (without objection by the judge conducting OEX proceedings), violate the procedural rights of Defendants, and attempt to mislead the court, in violation of Code of Business and Professions § 6068(d), (again without objection by the judge), without giving rise to an Equal Protection grievance cognizable in federal court?

19. Rectification of Time Lost in OEX Proceedings Here, after four MORE OEX hearings (and even greater expenditure of time and effort by Defendants), the judge conducting OEX proceedings recognized that he had again acted prematurely in seeking to force the disclosure of financial information with contempt of court threats. Does refusal by the State Supreme Court to reconsider its denial of discretionary review and reissue it (to give Defendants a "fresh clock" on the start of the 90-day deadline for U.S. Supreme Court review under 28 U.S.C. § 1257), constitute a federally cognizable grievance?

20. Adverse Impact of No Hearing or Transcript Are self represented Defendants, as a matter of Equal Protection of the Laws, entitled to the right (recognized in California's governing precedent *Grant Cooper v Superior Court*) to a hearing before a judge where reasons are discussed, that a judge's order that is the basis for contempt proceedings is in fact unlawful. Where the OEX judge has previously allowed a period of reflection and an

opportunity to present supplemental authorities before finalizing a contempt finding, is the conversion of what Defendants expected would be an April 20, 2009 hearing into an ex parte (no contact with the judge) rejection of an application a violation of Due Process of Law? Where the OEX judge had previously issued an order to supply information embodied in a transcript of proceedings, before attempting to finalize a contempt finding for refusal to comply, does the absence of a transcript (and no urgency, other than maximizing disruptive impact on Defendants' attempts to appeal the judgment whose enforcement is at issue), justify a federal finding that Due Process of Law has been violated?

21. Judge Boyd Ignores Defendants' Federal Appeal Here the judge conducting OEX proceedings initially considered an appeal to the U.S. Supreme Court, to be of no consequence, with respect to immediate enforcement of a fees judgment. He convened an EIGHTH OEX hearing where he sentenced Defendant to jail for asserting that federal appeal rights are part of the automatic stay provision of California's CCP § 916(a). Does a self-represented litigant's refusal to supply financial information in these circumstances justify a contempt of court jail sentence?

22. Significance of Inconsequential Habeas Lateness Does refusal by a state court of last resort, to consider a habeas corpus appeal on grounds of lack of timeliness, bar federal review of this issue in the following circumstances?: **a)** The hand delivered appeal reached the State Supreme Court several hours to two days earlier than it would have (on the

morning after the deadline), if placed in the U.S. mail (or given to an overnight delivery service) on the last allow-able day. **b)** At least several days of Defendant's preparation time for this habeas appeal were taken away by premature OEX enforcement efforts, and by other time consuming collateral attacks (a vexatious litigant initiative and a fourth ($19,000) demand for attorney fees by Plaintiff's counsel).

23. Should Defendant be Protected from OEX Abuse? The applicability of Sixth Amendment rights to contempt of court proceedings is recognized by *In re Oliver*. Can a judge conducting OEX proceedings dispense with the protections available for indirect contempt findings, when he does not allow defendants any opportunity to explain why their right to conduct their own case is being violated? When Judge Boyd (as he notes in his Order of July 23, 2008) has taken the time to study the file, his orders have ultimately come into compliance with legal requirements. But Judge Boyd's insistence on silencing Defendant Halliwell (who conducted the trial court proceedings which gave rise to the fees judgment whose enforcement is being sought) was the main reason why so many OEX hearings were necessary. In such circumstances, where an OEX judge has repeatedly allowed counsel for the judgment creditor to exploit loopholes in his prior stay orders, thereby imposing a tremendous burden on Defendants, is a United States Supreme Court stay of further proceedings below appropriate, until it has decided to grant certiorari of the California Supreme Court's denial of discretionary review in S168827 and S169634?

24. Is a Retrospective Fresh Clock a Proper Remedy? Does recognition by the OEX judge, in a subsequent order, that OEX proceedings are still premature, provide a basis for the U.S. Supreme Court to grant a "fresh clock" with respect to judgments more than 90 days past final action by state courts, where various tactics by Plaintiff and Sonoma County Superior Court were clearly and unequivocally efforts to disrupt Defendants' exercise of their right to seek federal review of alleged violations of their federal rights?

25. Basis for Disputed $20,720 Reading Fee Award This eviction situation is based on an unsuccessful attempt to invoke the Bill of Rights with respect to conditions, covenants and restrictions barring participation of tenants in dispute resolution procedures where homeowners, who elect the governing board, have full participation rights. Here there was also a demand for an UNREVIEWABLE $4,000 attorney's fees payment, as a condition for being given a reasonable time to find somewhere else to live. Can $10,000 in attorney's fees be properly imposed for resisting the $4,000 demand, and can $20,720 be awarded for reading the briefs seeking to document the facts of the case for the benefit of higher courts, without the total $30,000 award violating the Due Process Clause of the Fourteenth Amendment?

26. Two Front Overload of Pro Se Litigants' Capacity Does the overlap between briefing schedules for appeals of prior fees awards and for motions seeking additional fees (for resisting the

prior awards) constitute an adequate basis for a continuance so that future fees requests are put on the back burner, while appeals of prior fees awards go forward? Where a trial court supports opposing counsel's claim "we're under no obligation to time our motions to go along with whatever they have going on", does this constitute "jamming" Defendants and "keeping the heat on", which a state governing precedent (*Gamet v Blanchard*) has found to constitute a deprivation of Due Process of Law? Does the refusal of a Presiding Judge of a Superior Court to respond at all to a motion for a continuance in these circumstances constitute a violation of Equal Protection of the Laws?

27. Significance of the Absence of a Fees Justification Can a presumption that the trial court judge is best situated to determine the proper amount of attorney's fees be overcome, as a matter of Due Process of Law, when the party seeking the fees says NOTHING in support of the right to any fees or the proper level of payment at the fees hearing, and the trial court judge simply signs an order handed to her which says NOTHING about the issues involved, except to specify the amount to be awarded?

28. Payment Must be Refused for Fraudulent Tactics Where a long-standing California governing precedent (*Clark v Millsap*) and that State's Code of Business and Professions (§ 6068(d)) precludes use of fraudulent tactics and payment for activities tainted with fraud, may an opposing party be required to pay a lawyer for simply reading charges of misconduct against him, when that lawyer never cites ANY example of incorrect charges and insists,

without specificity, that what he has read consists only of "whimsy, dribble and nonsense"?

29. Affirmative Justification of Defendants' Filings Here State law (*Serrano v Unruh*) creates a safe harbor for voicing legitimate objections, and Defendants faced by a demand for payment for reading briefs (on issues where NO COURT HAS EVER DETERMINED PLAINTIFF TO BE A PREVAILING PARTY). Here every one of the briefs for which a reading fee is demanded is quoted extensively in a 293 page Notice of Appeal, and Plaintiff's counsel could not cite even a single excerpt in the Notice of Appeal where Defendants' position is wrong (or any other passage in the materials read which is legally or factually erroneous). Is an UNEXPLAINED award of fees here, for NOTHING MORE than brief reading, a plain violation of Due Process of Law?

30. Efforts to Sweep Fees-Related Issues under Carpet Here there has been a history in prior fees awards and rulings thereon by the Appellate Branch of trying to dispose of the issue before transcript-based briefing is possible, and to try to dispose of this issue on res judicata grounds once fees hearing transcripts can be cited in later appeal briefing. These transcripts show NO CONSIDERATION WHATSOEVER of the underlying fees-related issues at any of the trial court's fees hearings. Can fact-free, legal-concept-free, Court of Appeal orders be given any presumption of validity, when neither the members of the appeal panel, nor the counsel seeking fees payment said ANYTHING at all at any of the Appeal Hearings to support the award of fees?

31. Brief Reading Fee to Inhibit Documentation Here the Appellate Branch has engaged in evasive tactics to exacerbate a "two front" squeeze by protracted delays in preparation of transcripts and chronological indexes. It has refused to delay fees appeal hearings until transcripts are available, and has tried to obstruct filings which make Defendants' side of controversial issues available for higher court review (when the Appellate Branch has refused to address such issues). In this situation may a brief reading fee be considered a device to obstruct documentation of the facts and legal issues in the case, whereby opposing counsel and the Superior Court try to vitiate any meaningful appellate review?

32. Deliberate Cover-up to Protect Judge Rushing Here trial court judge Elaine Rushing was censured for her dishonesty and admitted favoritism, and therefore removed from involvement with criminal cases. But subsequently she was elevated to the position of Supervising Judge of the Civil Division. Appellate Branch judges have adamantly refused to address the dishonesty and favoritism which has been documented in detail with respect to Judge Rushing's conduct of a case. Would a reasonable person aware of the facts (California's legal reference point) conclude that Judge Rushing has been, in fact, the beneficiary of the favoritism she sought in the incident leading to her censure? Would an informed reasonable persons conclude that Defendants in *Paxinos v Halliwell & Parker* are being deliberately sacrificed by judges of the Appellate Branch, in order to spare Judge Rushing an embarrassment which could well become "the last straw," when she seeks

another six year term in office, for the first time since her censure?

33. Subserving Justice Limit on Attorney Fees Awards Does a system where reasonable attorney's fees are "too subjective" for any meaningful appellate review constitute a deprivation of property without Due Process of Law, for the party forced to pay fees WITHOUT ANY EXAMINATION OF THEIR VALIDITY. Are State (*Bailey v Taaffe*) limits on judicial discretion requiring it "to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of justice" federally enforceable as a matter of Equal Protection of the Laws?

34. Prevailing Party Status Limit for Fees Purposes In California (under *City of Shasta Lake v Shasta County*) "the law seeks to respect substance over nomenclature." Here opposing counsel asked the Appellate Branch to designate him as the prevailing party, for purposes of collecting attorney's fees for defending a judgment on appeal, but he did not secure such a designation. Here opposing counsel (Charles Jensen) could cite nothing in the briefs for which a reading fee is sought, where his position on any issue covered has been upheld by any court. Charles Jensen offered no defense of his claim for attorney fees at either the trial court fees hearing or the appeal hearing on its fees award. Would it elevate nomenclature over substance to treat Plaintiff's success in evicting Defendants, as a basis for prevailing party status in all subsequent appeals? Does the Equal Protection Clause of the Fourteenth Amendment protect Defendants in these circumstances?

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PETITION FOR A WRIT OF CERTIORARI

This Petition for Certiorari to the California Supreme Court seeks review of an aspect of the case (S169634) with a federal appeal deadline May 19, 2009. It is not possible at this time to deal with a third ($19,000) fees award in this case, which is now under appeal to the Appellate Branch of the Sonoma County Superior Court (with a May 26, 2009 deadline for the filing of Appellants' opening brief).

The Opinion Below dealt with a May 6, 2008 trial court judgment (drafted by Plaintiff's counsel) which said (without ANY additional explanation): "The Plaintiff's motion for attorneys fees for Plaintiff CHRYSANTHE E. PAXINOS as to Defendant JAMES PARKER only is granted in the amount of $20,680.00 and $40.00 for filing fee."

Defendants' preparation for the May 6, 2008 hearing was hampered by a struggle with the

Sheriff's Department Civil Bureau for information on how $10,118 in a holding account (which had been seized without warning from Defendant's bank account) had been turned over to Plaintiff's counsel to satisfy a previous fees award (where enforcement of this fees judgment was unequivocally barred by Sec 916(a) of California's Code of Civil Procedure). This logjam was broken on May 7, 2008 when the Sheriff's Civil Bureau provided records on this turnover which were missing (and are still missing) from the case file. Shortly thereafter, briefing on Defendants' November 21, 2007 Appeal from the illegal seizure of their $10,118 (which was originally authorized on January 14, 2008) was rescheduled on May 13, 2008.

The second-front squeeze between Judge Rushing's $20,720 attorney's fees award and her off-the-record funds turnover, was further complicated

by Plaintiff's counsel on May 23, 2008, when he initiated grossly premature Order of Examination (OEX) enforcement activity for the $20,720 fees award. Defendants argue in this Petition that a three-front squeeze (involving unequivocally illegal activity on the second and third fronts) constitutes a denial of Due Process of Law, in violation of the Fourteenth Amendment.

OPINION BELOW

The Appellate Branch Opinion of December 5, 2008 has an initial paragraph, noting that Defendants' appeal was set for oral argument on November 20, 2008, before Judges Rene Auguste Chouteau, Dana Beernink Simonds and James Bertoli. In its second paragraph, the Opinion notes that counsel for Plaintiff (Charles Jensen) and both Defendants (Michael Halliwell and James Parker) were present.

In its final paragraph the November 5, 2008 Opinion states:

> The trial court's attorney fee Order is **AFFIRMED**. De novo review indicates that an award of attorney's fees was proper and review of the record under the abuse of discretion standards indicates that the amount of attorney's fees is also proper.

Defendants' petition seeking reconsideration of this order was ignored until this one sentence response was filed on January 5, 2009: "Defendants' petition filed December 5, 2008 for the appeal heard by the Appellate Panel on November 20, 2008 is DENIED."

JURISDICTION

Defendants sought to clarify the evasive handling of Judge Rushing's unexplained $20,720 fees award, by an Appellate Branch Opinion (which was so generic it could have applied to any fees award, with the exception of the hearing date) in a

Petition for a Writ of Mandate (A123622), which was denied by the First District Court of Appeal on January 2, 2009 (in a one-judge order, which has no "law of the case" effect under Article VI § 14 of the California State Constitution, as noted in *Kowis v Howard* (1992) 3 Cal 4th 888, 894).

Defendants sought review of the First District Court of Appeal Order (that said only: "The petition for writ of mandate is denied.") by the California Supreme Court. Chief Justice George did not participate in the February 18, 2009 California Supreme Court Order (S169634) decision on Defendants' Petition, so 2/3 of the remaining six justices were required to grant review. The order of February 18, 2009 said only: "The petition for review is denied."

The deadline under 28 U.S.C. § 1257 to Petition for Certiorari to the California Supreme Court is May 19, 2009.

RELEVANT STATUTORY PROVISION

No statutory provisions were cited in any of the Court Orders related to this appeal (located in the Appendix) nor was any statute cited in Real Party's Opposition Briefing in the Superior Court. Real Party declined to respond to the California Supreme Court's briefing schedule in S169634. This evasiveness may be a natural outgrowth of the secret manner of handling Unlawful Detainer lawsuits.

California's unlawful Detainer Secret Trial Law makes a determine effort to block consultants from finding out about cases and educate tenants about their rights. Thus CCP § 1161.2(c) says [emphasis on the word "**and**" below is in Sonoma County's notice to tenants]:

> [A]ccess to the court file will be delayed for 60 days except to a party, an attorney for one of the parties, or any other person who (1) provides to the clerk the names of at least one plaintiff **and** one defendant in the action **and** provides to the

> clerk the address, including any applicable apartment, unit, or space number, of the subject premises, or (2) provides to the clerk the name of one of the parties in the action or the case number **and** can establish through proper identification that he or she lives at the subject premises. (CR-044)

In Sonoma County, according to the Recourse Mediation service which tenants are told to contact on their Notice of the provisions of CCP § 1161.2(c), NO TENANT HAS EVER WON BY INVOKING A RETALIATORY EVICTION DEFENSE IN SONOMA COUNTY. Judge Rushing wouldn't allow the jury in *Paxinos v Halliwell & Parker* to be informed of any OTHER aspect of California laws against arbitrary discrimination in housing. Therefore, nearly all tenants challenging eviction in Sonoma County, have lost within the 60 days that secrecy is supposed to be in force under CCP § 1161.2(c) However, in Sonoma County **the secrecy apparently lasts for the entire duration of the**

case, if this is what is necessary to beat a tenant into submission. All of the Case File Folders are stamped Secret (see Exhibit V-1 at CR-1068), and whenever a hearing takes place, the listing outside of the courtroom says only "Secret Case" without mention of the names of the parties involved.

STATEMENT OF THE CASE

A. Plaintiff Files Lawsuit, Defendants Respond

The $20,720 Reading Fee granted to Charles Jensen, which is the focus of this Petition for Certiorari, is simply a device for punishing Defendants for resisting the strong anti-tenant bias of the Sonoma County Superior Court. To gain a proper perspective, it is important to review the issues at stake in *Paxinos v Halliwell & Parker* (which became *Halliwell et al., v Sonoma County Superior Court*).

At the outset, James Parker complained about the obscure charges in Plaintiff's Complaint:

> James Parker also complained, "I had been trying for six months to try to find out what the issue is without any success." (Transcript at 11:20-22) Since Plaintiff's documents relating to his request for a court trial were missing from the case file, Defendants protested the tactics of Plaintiff's attorneys in their June 11, 2007 Request for Jury Trial: **In the most literal sense of this expression, they are "trying to pull a fast one."** It is difficult to imagine how this case can be fairly adjudicated, unless Plaintiff is forced to divulge the facts on which he relied in making his decision to evict. The sort of "Star Chamber" proceedings apparently utilized by the Meadow Pines Homeowners Association, wherein the complaint was anonymous, its contents confidential and Mr. Parker had no right to confront his accuser, nor to offer any sort of defense, nor to learn what in fact transpired in these proceedings, if any action was indeed taken (pursuant to the notice appended to Plaintiff's complaint alleging "threatening behavior"); cannot be allowed to stand as a basis for eviction. (CR-021)

Michael Halliwell cited the legal basis for James Parker's Due Process claim:

> We are right in the middle of the Bill of Rights in this situation. We have a case where Mr. Parker is denied the right to confront his accusers. We have this anonymous complaint to go. We have the situation he has not been

> able to find out the nature of the charge against him, another aspect of the Sixth Amendment. And finally, he was in the very act of petitioning for redress of grievances protected by the First Amendment that alienated the landlord. So this landlord is engaged in a type of discrimination that's a straight on challenge to the Bill of Rights. And as our last line of defense, we plead the Due Process Clause of the 14th Amendment. (Transcript at 81:7-19) *International Shoe Co. v Washington* (1945) 326 U.S. 316, 319, discusses the scope of Fourteenth Amendment limitations on State legal procedures: "Whether due process is satisfied must depend, rather, upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.*"

Defendants resisted the eviction threat based on a Kangaroo Court type process for dispute resolution used by the Meadow Pines Homeowners Association (which made second class citizens of tenants). Defendants relied on a well established federal governing precedent which invalidated the sort of unfair conditions, covenants and restrictions (CC & R's) faced by James Parker. (*Shelley v*

Kraemer (1948) 334 U.S. 1, 20: "*The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.*") Defendants also relied on a very well-established California precedent (*Marina Point v Wolfson* (1982) 30 Cal 3d 924, 957-958) which holds that "in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept or reject tenants on the basis of the landlord's own likes and dislikes." However, the trial court (backed by the Appellate Branch) refused to allow any sort of anti-discrimination defense.

Judge Rushing NEVER cited any authority for any of her contested rulings at trial or at any

hearing. This exchange (CR-1376:2-10) on the first day of the jury trial is typical:

> Michael Halliwell asked landlord Gus Paxinos: "In exercising your right to elect to allow me to stay or not to stay, did you make any inquiries whatsoever from any source whatsoever about any characteristic whatsoever of Michael Halliwell." (Transcript at 224:6-9)
>
> Charles Jensen intervened: "Objection, Your Honor. Relevance." (Ibid at 224:10)
>
> Judge Rushing ruled: "Sustained." (Ibid at 224:11)
>
> Michael Halliwell responded: "I'm asking him about his decision making process; this is a discrimination case, and I don't understand how it could possibly be irrelevant, [asking] how he is exercising his discretion." (Ibid at 224:12-14)
>
> Judge Rushing replied: "I'm sustaining the objection." (Ibid at 224:16)
>
> Yet in his Appeal Response Brief of December 17, 2007, Charles Jensen argued falsely: "Appellants' claim that they were somehow prevented from presenting their discrimination claims is untrue." (CR-1695:7-8, CR-1922:23 to CR-1923:10)
>
> James Parker cited Justice Brandeis' famous

statement on concealment:

> "Sunlight is the best disinfectant," a well-known quote from U.S. Supreme Court Justice Louis Brandeis, refers to the benefits of openness and transparency. [It is as applicable in contemporary life as ever.] If questions from constituents, the public, or the media make leaders or other responsible parties obfuscate, the questions are usually valid and the answers are not. People who feel uncomfortable under the bright light of scrutiny and criticism often have something to hide. (CR-666:4-7)

Defendants' April 20, 2009 Petition for Certiorari complains that if California's higher appellate courts continue to turn a blind eye to the way California's "Secret Lawsuit" approach to contested evictions is applied in Sonoma County, the 90% of tenants in Unlawful Detainer actions who are self-represented will have no hope of justice.

B. Statewide & Local Unlawful Detainer Policy

The main driving force behind the systematic denial of Due Process of Law to Defendants in

Paxinos v Halliwell & Parker has been a desire to shield from scrutiny by higher courts, several Sonoma County Superior Court policies which are contrary to state law.

Parsons v Superior Court of Marin County (2007) 149 Cal.App.4th Supp. 1, 6 notes that "Strict compliance with the specifically prescribed notice conditions is a prerequisite to invoking the summary procedures of unlawful detainer." However, Sonoma County Superior Court turned a blind eye to outright perjury by Plaintiff, which deprived Defendants of 2/3 of the preparation time they were due under the actual circumstances of service. *Parsons* also notes that rules for a party's challenging the sufficiency of service should not be applied so as to construe this as a general appearance, because this "moots the very point he is seeking to raise." [Citation]

However, the Appellate Branch of Sonoma County Superior Court ignored this mandate also.

Although the Summons refers tenants to a Judicial Council Website which tells them that trial dates are set by the court after five days are allowed for input by both sides, Sonoma County Superior Court automatically gives the earliest available trial date to the landlord, thereby eliminating all but voluntary discovery.

It is impossible for Defendants in Unlawful Detainer lawsuits to secure implementation of their rights under state law in Sonoma County Superior Court, because the only avenue for filing motions is an affidavits-only process without oral argument, similar to the one used in Contra Costa County Family Court and stricken down in *Elkins v Superior Court* (2007) 41 Cal 4th 1337, 1354, where Justice

Kennard cited *Goldberg v Kelly* (1970) 397 U.S. 254, 268-269, which affirms:

> [The person facing property deprivation] is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. *These omissions are fatal to the constitutional adequacy of the procedures. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.* Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Having failed to "shut down" the determined effort of Defendants to uphold important aspects of the Rule of Law which Sonoma County Superior Court is determined to ignore, Judge Rushing recently initiated a frontal assault in the form of a Vexatious Litigant initiative pursuant to CCP § 391. In upholding Judge Rushing in this matter, the Order of April 17, 2009 grossly distorts California's Vexatious Litigant Law. The Order concedes (at 6:4-

5): "Mr. Parker and Mr. Halliwell were defendants in the unlawful detainer case and so it does not count as one of the five cases." Yet the Order to Show Cause by Superior Court Judge Elaine Rushing, treats Defendants' five discretionary appeals, in the still ongoing selfsame unlawful detainer case, as five separate cases "all of which have finally been determined against you."

There is nothing in ANY of these denials of discretionary appeals, which remotely approaches the "law of the case" definition for finality in an ongoing lawsuit (*People v Shuey* (1975) 13 Cal 3d 835, 841). The one-judge Court of Appeal rulings (A121269, A123226 & A123622) say only: "The petition for writ of mandate is denied." Like Supreme Court rulings: "The petition for review is denied." (in S163276 & S168827), this is never a disposition on the underlying merits under

California law, only a denial of extraordinary procedural relief per CCP § 1086.

C. Off-The-Record Frozen Asset Turnover

The "part of the iceberg above the water line" with respect to Defendant's $10,118 turnover grievance is noted in our April 20, 2009 Petition for Certiorari:

> At the November 20, 2007 Claim of Exemption hearing re the $10,000 fees judgment, Charles Jensen cited nothing to contradict the holding of *Ziello v Superior Court* (1999) 75 Cal.App. 4th 651, 654-655, and CCP Sec 917.1(d) that a judgment consisting only of attorney's fees and other costs was not enforceable during the pendency of an appeal, without the appellant having to post an undertaking (appeal bond). It turned out that Charles Jensen's ground for opposition was an attempt to do an end run around CRC 8.750(a) that requires Notices of Appeal to be liberally interpreted in favor of their sufficiency. In spite of James Parker's totally unambiguous support for Defendants' appeals from the $10,000 attorney's fees award, Charles Jensen was able to convince Judge Rushing that Defendants' appeal from the initial award of the $10,000 should be ignored, because it was vacated and reinstated after the appeal. This is a direct contradiction

> of *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 997. Charles Jensen convinced Judge Rushing to disregard Defendants' appeal from the renewed award of the $10,000 on the ground that only Defendant Halliwell had signed it. This quibble is rejected in *Ehret v Ichioka* (1967) 247 Cal.App.2d 637, 640-641. Judge Rushing further trampled on the rule of law by refusing to allow James Parker any opportunity to respond to Charles Jensen's grounds, once they had been disclosed at the hearing. This was a direct violation of CCP Sec 703.580 (a) & (c).

Appellants' November 19, 2008 Petition for Mandamus to require a rehearing notes:

> James Parker also cited another aspect of Charles Jensen's effort to deprive him of a fair hearing: "In his opposition, he stated no argument [against my claim of exemption]. He just stated he was opposed to it." (Transcript at 481:8-14). In Defendants' appeal from similar tactics used by Charles Jensen earlier in the case, their December 24, 2007 brief cited *Hall v Superior Court (*1983) 133 Cal. App.4th 908, 918-919, where the Court of Appeal rejected similar procedural maneuvering which "places an unduly onerous burden on defense counsel to do all that is required within such a short period of time." *Hall* notes: "Court rules should be designed to accomplish the ends of justice, to protect rights, and to implement the substantive law.

> When a policy, practice or rule operates instead to defeat these purposes, and deprives an accused of a fair trial or determination on the merits, then the policy, practice or rule must give way." (CI 2726:9-20) James Parker asked for a modicum of fairness at the November 20, 2007 hearing: "Defendant has a right to know what the argument is ten days in advance of any hearing so that he can supply a written opposition to whatever the – Mr. Jensen's argument is." Judge Rushing responded: "Wrong. Wrong, sir. Wrong. I just told you the only pleadings on a claim of exemption are the claim of exemption and the opposition and that's it." (Transcript at 481:15-21)

Appellants' November 19, 2008 Petition for Mandamus to require a rehearing notes:

> One of the most clearly fallacious interpretations of *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, is one that it turned out to be Charles Jensen's argument, that a premature notice of appeal is legally ineffective. *Ziello* itself says that "an appeal from the judgment enables review of the costs ultimately awarded; see *Grant v List & Lathrop* (1992) 2 Cal.App.4th 993, 996" (75 Cal.App.4th at 655). The next page in *Grant, supra*, says that "there is a general rule that notices of appeal shall be construed in favor of sufficiency and the liberality with which appellate courts accept as timely an appeal filed too soon, i.e.

> before entry of judgment or order challenged." (2 Cal.App.4th at 997). (Id. at 19:1-9)

The Conclusion of James Parker's June 2, 2008 Brief in Support of His November 21, 2007 Appeal protests (at 15:10-22):

> Judge Rushing exercised her discretion over the conduct of proceedings in a way that violated *Jennings v Superior Court* (1967) 66 Cal 2d 867, 875-876, which holds that "discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." In fact, Judge Rushing seemed intent on following in the footsteps of the trial judge in *Gamet v Blanchard* (2001) 91 Cal.App.4th 1276, 1283 who was criticized by the Court of Appeal: "The judge's comments that he could 'jam' Gamet and that he wanted to 'keep the heat on,' when combined with the unexplained judgment dismissing the action shortly thereafter, seemed arbitrary and created the appearance of substantial unfairness."
>
> In setting aside CCP Sec 703.580(a) which allows amendments "in the interest of justice" and CCP Sec 703.580(c), which allows "production of other evidence, oral or documentary" in Exemption Claim proceedings, Judge Rushing herself was "wrong, wrong, wrong."

On the morning of November 21, 2007

Defendants took advantage of the fact that an unserved order can be appealed up to 90 days after it is issued, as per CRC Rule 8.751(a)(3). Their Notice of Appeal said: "Defendants James Parker and Michael Halliwell hereby appeal Judge Rushing's Order of November 20, 2007 AND her supporting Order of September 25, 2007 (which has never been provided to the parties, but simply signed and placed in the Case File.)" (CR-1204)

Defendants immediately filed a Claim of Exemption based on their having eliminated Charles Jensen's ground for Opposition (whether or not it was originally correct). James Parker's November 21, 2007 Claim of Exemption cited Appellate Branch actions which showed that James Parker had indeed already appealed the fees award, Judge Rushing determined he had not appealed, and it then continued:

> The Appellate Branch therefore has eliminated any argument that James Parker is not seeking appellate review of the fees award at issue. Thus the caption of the November 5, 2007 Notice of Time and Place for Filing of Briefs refers to the case as CHRYSANTHE E. PAXINOS, Plaintiff/Respondent, vs. JAMES PARKER, et al, Defendant/Appellants." *However, to "cut the Gordian Knot" in this case, James Parker has joined in a November 21, 2007 Notice of Appeal directed, inter alia, against Judge Rushing's Order of September 25, 2007. See attached copy of this Notice of Appeal, which unambiguously disposes of the claim that James Parker has not appealed from the judgment which is the basis of the levy that Charles Jensen is trying to enforce. Defendant/Appellant James Parker hereby reasserts his Claim of Exemption based on CCP Sec. 917.1(d) and Ziello v Superior Court (1999) 75 Cal. App. 4th 651.* (CR-1211)

Because Judge Rushing took off for the long Thanksgiving Day weekend without doing anything about the frozen $10,118 in the Sheriff's holding account, Defendants "beat her to the Court House" by FIVE DAYS, before she turned her attention to this matter. By this time she had NO arguable basis for jurisdiction, but this DID NOT keep her from

fulfilling her evident desire at the November 20, 2007 hearing. On November 26, 2007 she gave instructions to the Sheriff's Department, which caused Defendants' money to be turned over to Charles Jensen. (CR-2431) Of course, the Sheriff's Department has no access to court files, and assumed that Judge Rushing was acting within the scope of her authority.

> Judge Rushing took advantage of "soft spots" in the system of justice which she was able to exploit. 1) The Sheriff's Department does not forward a Claim of Exemption to court until an Opposition is filed; since Charles Jensen never filed an Opposition to Defendants' November 21, 2007 Claim of Exemption, Judge Rushing felt justified in ignoring a document (our Claim of Exemption which the Sheriff was holding onto) that was not in the files. But she certainly knew about it, according to the Sheriff's Department (as Defendants were told when the Sheriff finally agreed to "give up" the paperwork on this matter, six months after the events described here, and provided a November 21, 2007 Date-Stamped copy of the Claim of Exemption from their files). 2) There is NO proof of service in the files for Judge Rushing's September 25, 2007 fees

award to Charles Jensen, for the simple reason that this judgment was never served on the parties. Nevertheless, Judge Rushing inserted into her 11/07/2007 electronic docket entry describing the assignment of a reporter to the CLAIM OF EXEMPTION hearing and the date of hearing shown in Charles Jensen's 11/07/2007 Opposition, a false entry which states "NOTICE OF ENTRY OF JUDGMENT, SERVED 9/25/07" Had this been true, Defendants would not have been able to appeal Judge Rushing's September 25, 2007 $10,000 fees award, on November 21, 2007. Judge Rushing would have had a basis for claiming that James Parker had not signed an appeal from the $10,000 fees award (except that he did sign the appeal when the award was first made, which she chose to ignore). **3)** Judge Rushing "sanitized" her 11/20/07 Courtroom Minutes to avoid any mention at all of her grounds for ruling in Charles Jensen's favor on the Claim of Exemption. These Minutes explain in detail why Judge Rushing would not allow Defendant Halliwell to speak, or allow Defendant Parker to file anything to dispute Judge Rushing's circumvention of CRC Rule Sec 8.750(a). However, one would have no idea at all how this Claim of Exemption hearing differed from any other, from these Minutes. Thus there is no apparent inconsistency between Judge Rushing's ruling in Charles Jensen's favor and the basis for James Parker's November 21, 2007 Claim of Exemption.

Boddie v Connecticut (1971) 401 U.S. 371, 374 discusses the rule of law:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.

D. Order of Examination (OEX) Proceedings

Defendants had no choice, but to resist the disclosure of financial information demanded in OEX proceedings, to avoid repetition of the off-the-record judicial abuse discussed in Section C. There was NEVER the slightest justification in state law for such premature OEX proceedings. *Betz v Pankow* (1993) 16 Cal.App.4th 931, 938, points out a well

established rule:

> As a general rule, "the perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order ...." (§ 916, subd. (a).) The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. (Defendants' Memorandum re December 19, 2008 OEX Hearing at 13:1-18)

Judge Boyd swept aside CCP Sec 916, without explaining why he did so: Judge Boyd and Charles Jensen engaged in a colloquy which set forth their statute-free, governing precedent-free, vision of how a trial court has discretion to enforce its orders before even the bottom rung of the appeal process has been completed. Judge Boyd starts by stunningly ignoring his own order of July 23, 2008:

> As we sit here today, there is no stay on the enforcement of that order that has been ordered by any court? (Transcript at 14: 26-28)

Charles Jensen repeats the unsuccessful line of argument he offered, when Judge Boyd was considering whether to issue his July 23, 2008 stay order:

> That's correct. There has been no noticed motion, no noticed hearing for petition. They are simply papers that are filed – sometimes a motion, sometimes a petition – with no hearing set, no filing fee and no setting by the clerk and no stay order. (Transcript at 15:1-5)

Judge Boyd ignores CCP Sec 916, and proceeds to validate Charles Jensen's framework: "So there is no barrier to the enforcement of that judgment today?" (Transcript at 15:6-7) Charles Jensen confirms: "That is correct." James Parker objects: "We disagree with that." Judge Boyd responds: "I heard your argument, sir, and I disagree with your argument." (Transcript at 15:8-11) (Defendants' Memorandum re December 19, 2008 OEX Hearing at 16:10-25)

Defendants' Emergency Update of their January 2nd Petition for Mandamus states:

> Judge Boyd's Order of December 22, 2008 gives this justification for asserting his authority to enforce the disputed fees judgment, before either the First District Court of Appeal or the California Supreme Court has decided whether to review this matter: "The stay previously issued by this court was specifically limited by its language to a hearing to be held in the Appellate Division of the Sonoma County Superior Court. That hearing has been held and the contemptor's appeal of the order of attorney's fees was denied." This does not appear to be a sound basis for, in essence, chopping off the top two rungs of the process of appellate review. Just because review is discretionary at this level, does not mean that a lower court judge is justified in invading the jurisdiction of either the California Court of Appeal or the California Supreme Court. IF THE CURRENT OEX PROCEEDINGS ARE NOT DESIGNED TO HAMPER JAMES PARKER'S ABILITY TO FULLY PROSECUTE HIS APPEAL, THEY CERTAINLY HAVE HAD THAT EFFECT. SENDING APPELLANT TO JAIL (WHEN THE TIMELINE FOR FUR-THER REVIEW IS SO SHORT) WOULD BE THE ULTIMATE INFRINGEMENT OF HIS RIGHT TO APPEAL. (Id. at 2:16 to 3:2)

Order of Examination Proceedings (OEX) have twice involved threats of a contempt of court jail sentence for exercising our State appellate rights. Only at the last minute did Judge Robert S. Boyd pull back (in his Orders of July 23, 2008 and January 20, 2009) from trying to enforce his unlawful orders (issued in violation of California Code of Civil Procedure Sec 916(a)). Recently James Parker was sent to jail for defending his right to file this Petition, and refusing to accede to flagrant violations of his right to Due Process of Law.

E. $20,720 Reading-Fee-Only Attorney Award

James Parker's November 5, 2008 Reply Brief re May 27, 2008 Appeal set the record straight re false claims in Respondent's Opposition. Defendant James Parker's Reply Brief re May 27, 2008 Appeal (2:11-18) discusses the relatedness *vel non* of fees awarded to any appeal:

> Charles Jensen engages in deliberate distortion of the issue by saying (LNT 4:17-19): "Appellant's claim that Respondent failed to cite each point that he prevailed on. This may be true. However, there is no requirement that respondent do so." Appellants point is that there is no reference at all to ANY point on which Respondent had prevailed, thereby obscuring the lack of linkage of the basis for his fees request to any work which he had done. Defendants have listed the main items in a normal fees request by a party who has prevailed on appeal, and shown that there is NO link to Charles Jensen's $20,720 fees request.

Defendant James Parker's Reply Brief re May 27, 2008 Appeal (3:2-22) observes:

> Without citing any supporting case or provision in the rental agreement, Charles Jensen contends (LNT 5:8-9): "Appellants are under the mistaken belief that Respondent did not prevail on 'any' contract claim." At the May 6, 2008 Hearing, James Parker referred to Clause #13 of the rental agreement which says: "If any legal action or proceeding be brought by either party **to enforce any part of this agreement**, the prevailing party shall recover, in addition to all other relief, reasonable attorney's fees and costs." (CI 276) Appellants' Notice of Appeal (at 150-151) cited clear governing precedents on this issue: *Exxess Electronixx v Heger Realty Corp.* (1998)

64 Cal.App.4th 698, 708 notes that "the question of whether to award attorney's fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has 'prevailed' within the meaning of the provision and whether the type of claim is within the scope of the provision. (*Santisas v Goodin* (1998) 17 Cal.4th 599 at 602, 608-609, 617, 619.)" James Parker argued on May 6th: "it wasn't a contract issue, so he is not entitled to request us to pay for him." (Transcript at 13:7-9) Judge Rushing sidesteps this argument, without citing any supporting authority for her position or attempting to show how she reached this result in light of Clause #13 and the standards set forth in caselaw by Appellants in their filings. She refused to discuss the matter with James Parker, saying only: "That's my interpretation of the law. Another Court may disagree. That's why we have appellate divisions, et cetera." Judge Rushing gives no clue about the basis for her interpretation of the law, but whatever this basis is, IT MUST ADDRESS THE ACTUAL PROVISIONS OF THE RENTAL AGREEMENT.

Defendants' October 6, 2008 Analysis of May 6, 2008 Transcript (6:11-22) states:

> Since Judge Rushing had indicated she was not inclined to grant a postponement, James Parker tried to argue the merits of the fees request (by reminding Judge Rushing that

Plaintiff's counsel had never secured a jury finding of any contract violation, indeed he advised Judge Rushing that he was abandoning his effort to prove any cause at all: "I want to paraphrase a quote, but Charles Jensen walked away from any possibility of winning on a contractual claim or any other cause when on June 25th he relied, in front of you before the trial, [when potential jury instructions were being discussed] when he relied entirely on a landlord's right to evict at will. [After asking for forbearance as he tried to find this exchange in prior briefing, James Parker continued:] Judge Rushing said to Charles Jensen, 'I notice that in your motion you listed cause.' That's when he gave us the 60-day notice he said was for cause. And you reminded him of that and he responded, quote: 'That is correct, Your Honor.' You continued: 'Is that the theory you're proceeding on in the case?' Charles Jensen replied: 'It is not, Your Honor, simply because the code section says no cause is needed.'" (Transcript at 10:14 to 11:2) The ONLY case cited in Plaintiff's brief seeking $20,680 for reading Defendants' various filings, which relates to the work for which compensation is sought, squarely supports Defendants' position that contract claims are the only ones which may generate attorney's fees, and then only for the legal work performed in the defense of such claims: "When a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a

> provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in the prosecution or defense of those claims." *Scott Co. v. Blount* (1999) 20 Cal 4th 1103, 1109. (See Plaintiff's March 25, 2008 Brief at 7:15-19.)

Hsu v Abbara (1995) 9 Cal 4th 863, 873-874

discusses clear legislative intent:

> In 1987, the Legislature amended [Civil Code] section 1717 to its current form. (Stats. 1987, ch. 1080, Sec 1, p. 3648.) The Legislature replaced the term "prevailing party" with the term "party prevailing on the contract," evidently to emphasize that the determination of prevailing party for purposes of contractual attorney fees was to be made without reference to the success or failure of noncontract claims. (See, e.g., On v Cow Hollow Properties (1990) 222 Cal.App. 3d 1568, 1574.)

Hsu v Abbara cites an application of § 1717:

> One case, for example, involved cross-actions by neighboring landowners for breach of covenants, conditions, and restrictions (CC&R's containing an attorney fees provision. (Banks v Lucas (1992) 9 Cal.App.4th 365, 369): [In *Banks v Lucas supra*] because ultimately no relief was awarded to any party under the CC&R's, the Court of Appeal found, as a matter of law, that there was no party prevailing on the contract under section 1717.

(9 Cal 4th at 875)

James Parker's reasoning on the need for a party to show a contract violation to invoke a contractual provision for attorney's fees was directly supported by *Santisas v Goodin* (1998) 17 Cal.4th 599 at 602, 608-609, 617, 619. This governing precedent holds that "the question of whether to award attorney's fees turns on the language of the contractual attorneys' fees provision" and "whether the type of claim is within the scope of the provision." Judge Rushing cut James Parker off at this point, saying: "Okay. Mr. Parker, would you have a seat please." James Parker replied: "Well, I still have these other issues to address." Judge Rushing continued: "Okay, but there's a 20-minute limit on law and motion and we have exceeded that. If you have just a quick wrap up you can do that." (Transcript at 15:19-25) Judge Rushing's imposition of a 20-minute limit in

these circumstances violated *Schweiger v Superior Court* (1970) 3 Cal 3d 507, 514 which holds:

"Certainly the interest in preserving the summary nature of an action cannot out-weigh the interest of doing substantial justice. To hold the preservation of the summary proceeding of paramount importance would be analogous to the 'tail wagging the dog.'"

Our Motion for Rehearing re Appellate Order of December 5, 2008 (13:17 to 14:19) says:

> Without EVER tying A SINGLE WORD in any document he demands to be paid for reading to ANY ruling in his favor, or ANY work product he produced in the course of Appeal proceedings, or ANYTHING he said on May 6, 2008 in the course of persuading Judge Rushing to sign the totally unexplained $20,720 fees award he handed to her, or ANYTHING he said at the appeal hearing, Charles Jensen gives this (in his motion for Attorney's Fees) as the sole basis for ANY of the $20,720 he has managed to convince Judge Rushing (and so far the Appellate Branch) to approve:
>
> > Defendant's forced plaintiff's counsel to read all of his papers. Unfortunately

> counsel was not in a position to assume they were all a joke. An old Irish saying states "even a blind pig can find a truffle every now and then." These were not easy papers to read either. The arguments, and the term is used loosely, were disorganized and incoherent at best.

Defendants' October 6, 2008 Analysis of May 6, 2008 Transcript defends our filings:

> Judge Rushing ruled: "I have – as I said, you wrote a very long opposition to their motion, and this has to do with post trial attorney's fees. And you have filed, according to them – over 2,000 pages of documents post trial. That may well be. I didn't count them all." (Transcript at 12:10-13) (Id. at 7:20-21) James Parker responded: "Mr. Jensen is essentially arguing that he deserved $20,000 for just reading our briefs. But he forced us into writing such extensive briefs because he was attacking and feinting all different ways and we had to research and protect all our flanks, our back, our front, and it required presenting all these briefs just to protect our legal rights. He forced us into it. We didn't want to do it. We could have done other things with our lives. But now he wants $20,000 for the privilege of doing – of reading what he forced us into doing." (Transcript at 15:27 to 16:8) (Id. at 9:13-16)

Downey Cares v Downey Community Development Commission (1987) 196 Cal.App.3d 983, 994, observes:

> The trial court's exercise of discretion will not be disturbed unless the appellate court is convinced the award is clearly wrong, since the experienced trial judge can best determine the value of professional services rendered in that judge's court. (Serrano v Priest (1977) 20 Cal 3d 25, 49).

In the present appeal, this question springs to mind: "What professional services?" There is not one word Charles Jensen has uttered in any hearing transcript or a single passage in any brief that in any way reflects what he has gleaned from the documents, he wants $20,680 for having read. Section 16 of Defendant Michael Halliwell's Opening Appeal Brief quotes as close to a consideration of the underlying merits as took place when Judge Rushing considered the award of attorney's fees which is the basis for this appeal:

> At the May 6, 2008 hearing James Parker protested to Judge Rushing: "But the point here is he's never – he's never controverted with law any of the citations that we have – that we've briefed him on. All he said is they're dribble [Jensen's exact word], nonsense and whimsy; so I would like to ask the Court to ask him what percentage of those citations that were issued – what fraction are whimsy, dribble and nonsense?" Judge Rushing replied: "Okay, Mr. Parker, I'm not going to ask that question." James Parker continued: "One last thing, then. Okay. I would like to ask one more question. Can he now cite any one citation that's whimsy, dribble and nonsense?" Judge Rushing replied: "I'm not going to force him to do that." James Parker then complained: "Defendants take exception to that because all he's – essentially all his argument is it's all garbage. He's never controverted a single one of our citations, and they are scholarly, and they're well documented." (Transcript at 17:9-24)

There is NOTHING else in the Order of December 5, 2008 (besides a recitation of when the appeal hearing took place and who attended) except "The trial court's attorney fee Order is **AFFIRMED.**" Except for the perfunctory references, *supra*, to "De novo review" and "abuse of discretion," the Order of

December 5, 2008 reads like the Appellate Panel used the Order which Charles Jensen gave to Judge Rushing to sign on September 25, 2007, as a line-for-line guide, with the only changes being the date and the composition of the Court.

Appellants' April 18, 2008 Petition (at 8:19 to 9:6) discusses how Charles Jensen refused to accept the $375 specified by Local Rule 2.2E for the prevailing party in a normal court trial (*he demanded an UNREVIEWABLE $4,000* even though, when faced with Judge Nadler's refusal to allow a jury trial because the address of the property was put in the wrong place on Defendants' form UD-150, Defendants were willing to voluntarily leave the property). For fighting against this $4,000 unreviewable fees award for giving up, Defendants were eventually saddled with $10,000 in fees by Judge Rushing, even though *Santisas v Goodin* (1998) 17 Cal 4th 599, 614,

states: "We are satisfied that concern for the efficient and equitable administration of justice requires that the parties be left to bear their own attorney's fees." *International Industries v Olen* (1978) 21 Cal 3d 218, 224-225, explains: "*The purpose of litigation is to resolve participant's disputes, not compensate participating attorneys. Our courts are sufficiently burdened without combat kept alive solely for attorney fees.*")

Blum v Witco Chemical Corp. (1987) 829 F.2d 367, criticizes this sort of phenomenon, where a battle over fees overshadows everything else in a case:

> As we have warned, the inquiry into the proper fee should not "assume massive proportions...dwarfing the case in chief." *Lindy Bros. v Am Radiator & Standard Sanitary Corp*, 540 F.2d 102, 116 (3rd Cir 1976)

Mills v Eltra Corp. (1981) 663 F.2d 760 also cites the *Lindy* warning about fees proceedings "dwarfing the case in chief" and decries a situation

in the case under review where "The fee proceedings have become the main event rather than the side show."

Also, Charles Jensen ignores Defendants' citations of ethical limits on fee payment.

> *Attorney's Oath*: "I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law." (CR-359:11-13)
>
> *Clark v Millsap* (1926) 197 Cal 765, 785: "A court may refuse to allow an attorney any sum as an attorney's fee [for tactics] tainted with fraud. 'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered, as will acts in violation or excess of authority, and acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of its duties.' (6 Cor. Jur. 722, 723.)" (CR-359: 13-16)
>
> *Goldstein v Lees* (1975) 46 Cal.App.3d 614, 618 notes the relevance of ethics to fees: "It is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility. (*Clark v*

Millsap (1926) 197 Cal 765, 785)"

James Parker's November 20, 2008 oral remarks, which give the details of eight false statements in Respondent's October 27, 2008 Opposition Brief (Transcript at 13:27 to 17:3), and the lie in Charles Jensen's oral statement (the details of which are set forth in our January 2, 2009 Mandamus Petition at 53:16 to 54:8) which Respondent's Opposition does not try to explain, except to say: "Counsel for Respondent has never been caught lying." James Parker further quoted Respondent's Opposition: "While counsel for respondent has read the appellants' Index of Plaintiff's Misrepresentations and Rules Violations, there was nothing in it worthy of response." James Parker then asked: "Does Charles Jensen wish at this time to explain any of his latest alleged misrepresentations, or cite anything incorrect in our

previous charges of professional misconduct?" When Charles Jensen said nothing, James Parker said to the Court: "Your Honor, I just want it to be said that there was no response." Judge Chouteau responded: "I am indicating there should not be a response." (Transcript at 17:7-23)

The Court of Appeal in *Denton v Smith* (1951) 101 Cal.App.2d 841, 845 ruled:

> "Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; as will acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties." (6 Cor.Jur.722, 723.)" (*Clark v Millsap* (1926) 197 Cal 765, 785) *Plaintiff Denton's conduct with respect to the matter of the fees herein cannot be said to meet the standard of fairness required to entitle him to recover on the contract sued upon*. (Emphasis added.)

Clancy v State Bar (1969) 71 Cal 2d 140, 148, equates lies and hiding part of the truth:

> In *Grove v State Bar* (1965) 63 Cal 2d 312, 315 it was held that concealment can mislead as

> effectively as a false statement. "No distinction can therefore be drawn from among concealment, half-truth and false statements of fact." Therefore there is no merit to petitioner's contention that his misconduct does not warrant disciplinary action.

Crayton v Superior Court (1985) 165 Cal.App. 3d 443, 447 observes:

> In *Di Sabatino v State Bar* (1980) 27 Cal 3d 159, 162-163, an attorney was disciplined. . . The failure was determined to constitute a "concealment of information which misled" the court. The court founded its holding upon the special statutory duty of attorneys (Bus. & Prof. Code, Sec 6068(d)); Rules of Prof. Conduct, rule 7-105) not to mislead a court. The court observed that "concealment of material facts is just as misleading as explicit false statements. . . ."

As if to rub salt into the wound, Charles Jensen was awarded a fee of $282 for reading the filing which cited this case (which Judge Rushing flouted throughout proceedings):

> Although discretion is vested in the trial judge, that discretion is not unfettered. It cannot be exercised arbitrarily, but must be an impartial discretion to be exercised in

> conformity with the spirit of the law and in a manner to subserve the ends of substantial justice. (*Longshore v Pine* (1986) 176 Cal.App. 3d 731, 737) (CR-363:16-18)

Defendants pointed out (in Exhibit #43 at CR-209 and in their July 16, 2007 analysis at CR-198) another California Supreme Court decision which barred Charles Jensen's tactic, of using exorbitant fee demands as a device to form a basis for demanding even more, should the opposing party fail to capitulate:

> It is ironic that Charles Jensen cites a case in support of his request for an award of full attorney's fees (*Serrano v Unruh* 32 Cal 3d 621, 1982) that contains a warning that appears applicable to the tactics he has used in MCV 191306 – about those who "force their opponents to a Hobson's choice of acceding to exorbitant fee demands or incurring further expenses by voicing legitimate objections." (32 Cal 3d at 635.)

Defendant Halliwell's Reply Brief re May 27, 2008 Appeal (9:22 to 10:5) says:

> There is not a single instance in any

> transcript, Courtroom Minutes, or ruling by Judge Rushing which in any way addresses Defendants' documented complaints about the evasive and sometimes illegal tactics used by Charles Jensen. Nor does Charles Jensen cite a single instance in his own brief of any allegedly false charge made by Defendants. Charles Jensen's only reply to the misconduct charges he wants to be paid for reading, is that it does indeed take many pages to establish the context, set forth Respondent's various sneaky maneuvers and cite caselaw which precludes this sort of behavior.
>
> Parker's May 5 Affidavit re May 5, 2008

Tentative Ruling (2:21 to 3:9) notes:

> Charles Jensen's demand for $20,000 in fees for having to read the "irreverent dribble" produced by Defendants, because "even a blind pig can find a truffle every now and then" was timed for maximum disruption of Defendants' appeals to the First Circuit Court of Appeal and the California Supreme Court. In their April 30 (1:02 PM), 2008 Petition to Presiding Judge Knoel Owen to Postpone the May 6, 2008 Hearing on Attorneys Fees, Defendants argued that before any award of fees for opposing Defendants' appeals should be considered, the appeal briefing schedule abrogated by the Order of February 5, 2008 should be reinstated and completed.
>
> During the time when briefing was suspended

on the appeal challenging the validity of Judge Rushing's delivery of $10,118 of Defendants' assets to Charles Jensen, Plaintiff filed another ($20,720) attorney's fees motion and (after Sonoma County Superior Court Presiding Judge Knoel Owen ignored Defendants' April 30, 2008 motion seeking to postpone the fees hearing, until Defendants were under less pressure from the demands of appealing jury trial issues to the State Supreme Court) Judge Rushing awarded the full amount, that Charles Jensen requested for reading Defendants' briefs relating to issues, still unresolved in the appeal process.

Defendants reminded Presiding Judge Owen in an October 14, 2008 petition:

> On April 30, 2008, in full compliance with every-thing the window clerks asked of them, Defendants filed their "Petition to Presiding Judge Knoel Owen to Postpone May 6, 2008 Hearing on Attorneys Fees." The window clerks informed Defendants to check Box 73 in the Hall of Justice for a response. They

checked Box 73 repeatedly up until the May 6, 2008 hearing was upon them, but no action was apparently taken on this motion.

With various deadlines impinging on them from different directions, Defendants are in no position to try to untangle what is going on behind to scenes to disadvantage them in their efforts to compile an appropriate record of the factual and legal aspects of this case. When one considers the palpable evasiveness in the orders issued by Judges Rushing and Chouteau in this matter and the No Process of Law which is available at their hearings, *it is hard to see how a reasonable person aware of the facts in this matter would conclude that the required (by judicial ethics canons 1 and 2A) "appearance of impartiality" has been maintained by the Sonoma County Superior Court.* In addition to the other duties of a Presiding Judge, CRC 10.603(c)(4)(A)(i) provides: "The presiding judge must notify the Commission on Judicial Performance of a judge's substantial failure to perform judicial duties." *Presumably this mandate implies the authority to keep the appearance of improper favoritism from growing to even larger proportions in the case at bar, by taking necessary corrective action.*

The timing and scope of the $20,720 fees hearing on May, 6, 2008, was a deliberate effort to interfere with and punish Defendants' efforts to

appeal a prior attorney's fees award. Such reprisals are contrary to federal policy, for reasons which are fully applicable to State legal proceedings. Thus, *Webster v Sowders* (1988) 846 F.2d 1032, 1040 observes:

> Just as it appears clear that a trial judge cannot sanction a party or lawyer for taking an appeal, we do not believe that it is proper here for the District Judge to threaten to sanction the defendants or their attorney for filing a motion to stay his order pending appeal on the grounds that the underlying appeal is frivolous. The only purpose of such a threat is to prevent an appeal. Appeals of district court orders should not be deterred by threats from district judges.

REASON FOR GRANTING CERTIORARI

The logical and orderly way of handling a broad-gauged assault on the Rule of Law by a State Superior Court (where that Court's opinions have been totally evasive, and the Plaintiff in the lawsuit has refused to respond to any of Defendants charges in the briefing opportunity provided by the State's

highest court), is a remand to a Federal District Court to compile a reliable factual record. An essential preliminary to a District Court remand is granting Certiorari, to prevent the $20,720 Reading Fee here from becoming unreviewable. There is no prospect that the Sonoma County Superior Court will cease its obstructionism on its own.